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SUPREME COURT, U. S.

In The

Supreme Court of the United States

October Term, 1970

No. 604

LEHRBACH CONSTRUCTION COMPANY,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
A MUNICIPAL CORPORATION, AND
HERTER O. SUPPINGER,

Respondents.

On Petition for a Writ of Certiorari to the
Court of Appeals of Maryland

PETITIONER'S REPLY BRIEF

Charles G. W. Atwater,
Mr. James A. Atwater,
406 One North Charles Street,
Baltimore, Maryland 21201,
Counsel for Petitioner.

The Daily Record Co., Baltimore, Md. 21202

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COURT OF APPEALS OF MARYLAND

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STATEMENT OF THE CASE

Respondents' Brief in Opposition raises new issues of fact not previously presented in the record or in prior briefs. This Reply Brief is directed only to such issues.

In the City of Baltimore's Statement of the Case it is said that "apparently Maiden Choice Run is wholly within the Petitioner's property line."

It is further stated that the Petitioner in this proceeding attempted to obtain "a rezoning of Lot 'P' from Residential to Commercial."

Both of these statements are in error and are unsupported by the record.

The only issue argued in the Brief in Opposition is the factual issue of whether or not this property is denied all access. Respondents argue that there is no evidence in the record to support the allegations made in the Petition for Certiorari that the property is denied all access, and they file new exhibits with their brief which they allege support their position.

We shall endeavor to point out specifically from the record the errors in the Brief in Opposition.

ARGUMENT

I.

THE RECORD IS REPLETE WITH EVIDENCE SHOWING THERE IS A DENIAL OF ACCESS.

The references herein marked "E. ....." are to the Joint Record Extract originally printed and filed in the Court of Appeals of Maryland which was filed as part of the record in this Court.

The original application (E. 14, 15, 16) was as follows:

> "Install driveway and culvert across corner of lot 22 known as W. S. Primson Ave. 509′ 1″ N. Wilkins Ave."

This was paraphrased at the time of the hearing before the Board of Municipal and Zoning Appeals by the clerk to the Board, Mr. Rubin, at E. 20, where he refers to the application as one "for ingress and egress to the adjoining commercial lot."

The testimony of the first witness before the Board, Ernest J. Litty (E. 20), referring to the fact that there originally was a bridge across Maiden Choice Run, said:

> ". . . the City does not feel that it wants to rebuild the bridge. So, the only solution that I had, in order to get into the property, *there's no other access to the property*, was to acquire the piece of residential property alongside, in order to put a culvert over Maiden Choice Run, in order to get into the property." (Emphasis added.)

He was asked later by Mr. Cuccia, a member of the Board, whether there was any other way to get into the property, and he said, "Yes, but you have to go across the residential property there also" (E. 21).

The Chairman of the Board commented as follows (E. 24):

> "That's why the access would be into either of the two pieces of property which are commercial. He wants to store in there. I don't know how anybody is going to get into it unless they can go up through one of these blocks. The shortest way would be through Unetta Avenue."

Counsel for the protestants, Mr. McGuirk, commented (E. 28):

> "At the present time, I certainly can be sympathetic to anybody who cannot get use out of his property, but at the present time this property is being used by the children of the neighborhood. It's a shame that it has to be used in this particular way. We are going to recommend the City purchase this as a park. As it is now, *it is landlocked.*" (Emphasis added.)

The Board of Municipal and Zoning Appeals in its opinion referred to this as an application "to permit the construction of a driveway and metal culvert for ingress and egress to the adjoining commercial lot" (E. 38).

The Board then makes a specific finding of fact on the issue of access as follows:

> "The testimony shows that the only access to Lot 21 and Lot 10, shown on the plat filed with the Board, is on Primson Avenue" (E. 38).

The *nisi prius* judge, Anselm Sodaro, makes also this same finding of fact:

> "The testimony further showed that the only egress to Lot 10 and Lot 21, as shown on the plat, is on Primson Avenue; that a City bridge had been removed and without access the property cannot be used in conjunction with the proposed construction office and warehouse on the commercially zoned property; . . ." (E. 7).

The finding by the *nisi prius* court is fully supported by all of the testimony produced in the Baltimore City Court. We specifically refer to the statement of counsel at the top of E. 13 and to the testimony of Mr. Litty later on that page in answer to the direct question, as follows:

> "Q. What access does that property have to any public street as of the moment? A. None. There is no access at all. Primson, at one time, there was a bridge there which the City has removed, or someone has removed, so there's no access to the property bordering on the tracks, commercial property."

The question of the denial of access was not only raised in the brief of the Petitioner as appellant in the Maryland Court of Appeals, but was ruled on by the Court of Appeals in its opinion. The City Solicitor, remarkably, comments on this by noting that "Other types of access were now possible." We find it inconceivable that the City Solicitor's office seriously argues that commercial property has access when the only access for carrying in supplies and materials is by "pack-train" (257 Md. at p. 640).

II.

THE FACTUAL ARGUMENT BY THE CITY THAT THE PRIMSON AVENUE BRIDGE IS ON THE PETITIONER'S PROPERTY AND IS NOT A CITY BRIDGE IS NOT SUPPORTED BY THE RECORD.

All references from testimony at the Board of Appeals and the testimony in the Baltimore City Court and the finding by the Board of Appeals and the finding by the Baltimore City Court and the conclusions by the Court of Appeals of Maryland all refer to this as a City bridge (E. 7, 13, 18, 20, 25, 26, 38).

The addition of this issue at this stage in the proceedings appears to be improper. It is a violation not only of Maryland Rule 885* which governs questions which our Court of Appeals will decide, but it is also in violation of the rules of this Court and contrary to the decisions of this Court as to what questions will be considered. *Ellis v. Dixon*, N.Y. (1955), 75 S. Ct. 850, 349 U.S. 458, 99 L. Ed. 1231, Rehearing denied 76 S. Ct. 37, 350 U.S. 855, 100 L. Ed. 759.

Factually, accepting the new exhibits filed by the City Solicitor's office as properly before this Court, the deed to the Petitioner does not support the allegations of the Brief in Opposition that the Petitioner has title to the bed of Maiden Choice Run. The deed specifically binds *"in part"*

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* Maryland Rules of Procedure:

Rule 885. Scope of Review — Limited to Questions Decided by Lower Court.

This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court; but where a point or question of law was presented to the lower court and a decision of such point or question of law by this Court is necessary or desirable for the guidance of the lower court or to avoid the expense and delay of another appeal to this Court, such point or question of law may be decided by this Court even though not decided by the lower court. Where jurisdiction cannot be conferred on the Court by waiver or consent of the parties, a question as to the jurisdiction of the lower court may be raised and decided in this Court whether or not raised and decided in the lower court.

along the center of Maiden Choice Run. It also contains the following paragraph:

> "Subject also to any rights the Mayor and City Council of Baltimore may have in the bed of Primson Avenue as heretofore laid out through the above described property" (Brief in Opposition, p. 13).

Construction of this deed, with all possible inferences made in favor of the City's argument, shows Petitioner may have at most bare legal title to *part* of the bed of Maiden Choice Run, *subject to* the rights of the City to use the full platted street Primson Avenue.

CONCLUSION

The Petitioner is not seeking, as the City Solicitor would have this Court believe, to have the "taxpayers of a municipality to provide an easy form of access to private property." Petitioner is asking only that it may have access to its property at its expense so that it may not be denied all use of its property.

Baltimore City, in its brief, makes no effort to argue the merits of the petition in this case. It seeks only to raise a new issue of fact, unsupported by and contrary to the record. The City has not endeavored to show that the decision of the Court of Appeals of Maryland, if left undisturbed, will not result in taking of property without compensation.

The Petition for Certiorari should be granted by this Court so that it may review, on the merits, the constitutional issue involved.

Respectfully submitted,

CHARLES C. W. ATWATER,
MYLANDER & ATWATER,
Counsel for Petitioner.